

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 3, 2008 Session

JEFF FITZGERALD v. ANDREW ABBOTT

**Direct Appeal from the Circuit Court for Coffee County
No. 34,510 Jerry Scott, Senior Judge, Sitting by Designation**

No. M2008-00920-COA-R3-CV - Filed February 5, 2009

Plaintiff appeals the trial court's award of summary judgment to Defendant in this action for intentional interference with employment. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Jonathan R. Bunn, Tullahoma, Tennessee, for the appellant, Jeff Fitzgerald.

Tim K. Garrett and Justin A. Page, Nashville, Tennessee, for the appellee, Andrew Abbott.

OPINION

Plaintiff/Appellant Jeff Fitzgerald (Mr. Fitzgerald) was employed as the store manager of Lowe's Home Centers, Inc. ("Lowe's") in Tullahoma from June 2003 to February 2005. Defendant/Appellee Andrew Abbott (Mr. Abbott) is a Lowe's district manager, and was Mr. Fitzgerald's direct supervisor. Mr. Fitzgerald's employment at Lowe's was terminated in February 2005.

In August 2005, Mr. Fitzgerald filed a complaint against Mr. Abbott in the Circuit Court for Coffee County alleging that Mr. Abbott "intentionally, maliciously and without justification procured the discharge of [Mr. Fitzgerald] from his employment as the manager of [the] Lowe's store[.]" He further alleged that Mr. Abbott's actions were motivated by Mr. Abbott's own interests, and not the best interests of Lowe's. Mr. Fitzgerald sought compensatory damages in an amount not exceeding \$750,000 and exemplary damages in the amount of \$250,000, and demanded a trial by jury. Mr. Abbott answered in September 2005, denying Mr. Fitzgerald's allegations and asserting that he at

all times acted in good faith in the best interests of Lowe's in accordance with his business judgment. Following discovery, cross motions for summary judgment, and a hearing on November 5, 2007, the trial court entered an order denying Mr. Fitzgerald's motion for partial summary judgment and granting Mr. Abbott's motion for summary judgment. By order entered March 17, 2008, the trial court awarded summary judgment to Mr. Abbott on the grounds that Mr. Abbott was not a "third party" to Mr. Fitzgerald's employment relationship with Lowe's for the purposes of sustaining a tort action for intentional interference with employment. Mr. Fitzgerald filed a timely notice of appeal to this Court on April 11, 2008.

Issues Presented

Mr. Fitzgerald presents the following issues for our review:

- (1) Whether, upon the Defendant's motion for summary judgment, the trial court erred in failing to take a view of the evidence in a light most favorable to the Plaintiff, the non-moving party and, whether the trial court erred by failing to draw all reasonable inferences in Plaintiff's favor.
- (2) Whether the trial court erred in granting summary judgment to the Defendant where the evidence, viewed in a light most favorable to Plaintiff, shows that the Defendant, motivated by his own interests, intentionally, maliciously and without justification procured the discharge of Plaintiff from his employment.

Standard of Review

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party moving for summary judgment must affirmatively negate an essential element of the nonmoving party's claim, or conclusively establish an affirmative defense. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). When determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588. We review an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Analysis

It is well-settled in Tennessee that, subject to narrow exceptions not present in this case, an at-will employment relationship may be terminated by an employer or employee for “good cause, bad cause, or no cause.” *E.g., Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994)(citations omitted). Tennessee recognizes, however, a tort action based on the intentional interference with an at-will employment relationship by a third party acting without privilege or justification. *Id.* In order to sustain such a claim, the plaintiff must demonstrate that the defendant caused the plaintiff’s discharge intentionally and without justification. *Id.* at 331. Although an action for intentional interference with an at-will employment relationship may be brought against a director, officer, supervisor, or employee of the corporation or entity by which the plaintiff is employed, such an action can be maintained only if the plaintiff establishes that the defendant acted as a third party to the employment relationship when he performed the acts causing the plaintiff’s discharge. *Waste Conversion Sys., Inc. v. Greenstone Indus., Inc.*, 33 S.W.3d 779, 782 (Tenn. 2000); *Forrester*, 869 S.W.2d at 331. The critical factors are “intent, motive or purpose, and means.” *Forrester*, 869 S.W.2d at 333. Where the defendant acted “within the general range of [their] authority” and was “substantially motivated by an intent to further the interest of the corporation,” his acts are considered to be those of the corporation and a claim for intentional interference with an employment relationship will fail. *Waste Conversion*, 869 S.W.3d at 782; *Forrester*, 869 S.W.2d at 334-335.

In this case, Mr. Fitzgerald acknowledges that Mr. Abbott did not have the authority to discharge him without approval from Mr. Abbott’s superiors at Lowe’s. As in *Forrester*, there is no dispute in this case with respect to intent or means. Rather, in his brief to this Court, Mr. Fitzgerald asserts that Mr. Abbott’s “reporting of [Mr. Fitzgerald] to his superiors was false and malicious and done in furtherance of [Mr. Abbott’s] own interests.” He further asserts that the trial court erred in awarding summary judgment to Mr. Abbott where, at minimum, there is a genuine material issue with respect to Mr. Abbott’s motive.

In analyzing whether a third party relationship existed for the purposes of a claim for intentional interference with employment relationship, the *Forrester* court observed that there was no evidence in that case that the plaintiff and defendants had any relationship other than through their employment; that there was no evidence of ill will or “other attitude or emotion” toward the plaintiff except within the employment context; and that there was no evidence that the defendants would benefit personally from plaintiff’s discharge. *Id.* at 334. A similar lack of evidence of third party standing or status exists in this case, and Mr. Fitzgerald does not assert otherwise.

Additionally, the record in this case includes the affidavit of Lowe’s regional vice president, Edward E. Raines, Jr. (Mr. Raines), who stated that, on February 3, 2005, he and Regional Human Resources Manager Dwight Hershberger (Mr. Hershberger) independently evaluated the Lowe’s store managed by Mr. Fitzgerald and agreed with Mr. Abbott’s assessment that it did not meet Lowe’s standards. Mr. Raines stated that he and Mr. Hershberger performed a “WalkThru” of the Lowe’s store and independently evaluated performance in areas including general store condition

and cleanliness, front checkouts, customer service, inventory replenishment and stocking, safety and security, merchandising standards, pricing and department maintenance. Mr. Raines further stated that, after performing the “WalkThru,” he “concluded for [him]self that the condition of [the] [s]tore did not meet Lowe’s standards.” Mr. Raines stated that he approved the termination of Mr. Fitzgerald’s employment. The record also contains Mr. Hershberger’s affidavit confirming Mr. Raines’ statements. Mr. Hershberger further stated that he independently approved the termination of Mr. Fitzgerald’s employment. It is undisputed that Mr. Fitzgerald was not present for this evaluation, although the parties disputed whether Mr. Fitzgerald was advised that Mr. Raines and Mr. Hershberger would be evaluating the store on February 3, 2005.

In light of the evaluations conducted by Mr. Raines and Mr. Hershberger, who separately and independently determined the Lowe’s store managed by Mr. Fitzgerald did not meet Lowe’s corporate standards, and in the absence of any evidence or allegation suggesting that Mr. Raines and Mr. Hershberger were not acting in the best interest of Lowe’s, Mr. Fitzgerald’s claim must fail. Mr. Abbott’s actions did not cause Mr. Fitzgerald to be discharged. Rather, Mr. Fitzgerald was terminated by Mr. Abbott’s superiors who, based on their first hand knowledge and evaluations, determined that termination of Mr. Fitzgerald was in the best interests of Lowe’s.

Holding

In light of the foregoing, we affirm the trial court’s award of summary judgment to Mr. Abbott. Costs of this appeal are taxed to the Appellant, Jeff Fitzgerald, and to his surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE